# STATE OF MICHIGAN

# COURT OF APPEALS

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| MARIJA BERISAJ and NIKOLA BERISAJ,<br><br>Plaintiffs-Appellants, | UNPUBLISHED<br>July 7, 2011 |
| v | No. 297130<br>Macomb Circuit Court |
| ALI MURRAY and FUTIMA MURRAY, a/k/a FATIMA MURRAY,<br><br>Defendants-Appellees. | LC No. 2008-001279-NO |

Before: DONOFRIO, P.J., and CAVANAGH and STEPHENS, JJ.

PER CURIAM.

Plaintiffs appeal as of right from a circuit court order granting defendants' motion for summary disposition pursuant to MCR 2.116(C)(10) in this premises liability action. We affirm.

While babysitting defendants' children, plaintiff Marija Berisaj[1] was injured when she stepped on a hose on a step outside defendants' house and fell. Defendants argued that the hazard was open and obvious, whereas plaintiffs contended that it was not because the hose was obscured by the edge of the porch above it.

Summary disposition may be granted under MCR 2.116(C)(10) when "there is no genuine issue of material fact, and the moving party is entitled to judgment . . . as a matter of law." This Court reviews a trial court's decision on a motion for summary disposition de novo. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

Plaintiff was a business invitee on defendants' property. See *Lundy v Groty*, 141 Mich App 757, 759; 367 NW2d 448 (1985). Invitors are not absolute insurers of the safety of their invitees. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 614; 537 NW2d 185 (1995). "In general, a premises possessor owes a duty to an invitee to exercise reasonable care to protect an invitee from an unreasonable risk of harm caused by a dangerous condition on the land." *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516; 629 NW2d 384 (2001) (citation omitted). The duty

[1] The singular term "plaintiff" is used to refer to Marija Berisaj only. Plaintiff Nikola Berisaj has filed a derivative claim for loss of consortium.

generally does not encompass warning about or removing open and obvious dangers unless the premises owner should anticipate that special aspects of the condition make even an open and obvious risk unreasonably dangerous. *Id*. at 517. Whether a hazardous condition is open and obvious depends on whether it is reasonable to expect that an average person with ordinary intelligence would have discovered the danger and risk presented upon casual inspection. *Novotney v Burger King Corp (On Remand)*, 198 Mich App 470, 474-475; 499 NW2d 379 (1993). A trial court should not grant summary disposition if there is a genuine issue of material fact with respect to whether an ordinary user upon casual inspection could not have discovered the hazard. *Price v Kroger Co of Mich*, 284 Mich App 496, 501-502; 773 NW2d 739 (2009).

In this case, the allegedly hazardous condition is a garden hose lying across a porch step. Plaintiff acknowledged that she would have seen the hose if she had looked down. In an effort to create a question of fact about whether the danger was open and obvious, plaintiffs rely on testimony suggesting that the hose was on a portion of the step that was not visible as plaintiff approached the step because it was obscured by the edge of the porch above it. But that phenomena is an inherent characteristic of descending steps, and the risk of harm from ordinary steps is not unreasonable. See *Bertrand*, 449 Mich at 616-617.

Plaintiffs also argue that application of the open and obvious doctrine requires that a hazard be evaluated from the position of the plaintiff, and here plaintiff was running (after defendants' young child). However, the evaluation of a hazard from the position of a plaintiff does not include haste that is unrelated to the condition of the premises. In *Lugo*, 464 Mich 523-524, the Court rejected the view that the plaintiff's inattention was an appropriate consideration in the analysis, explaining that "it is important for courts in deciding summary disposition motions by premises possessors in 'open and obvious' cases to focus on the objective nature of the condition of the premises at issue, not on the subjective degree of care used by the plaintiff." Plaintiff's haste, like a plaintiff's inattention, is not an appropriate consideration in evaluating whether the hazardous condition was open and obvious. In our view, "casual inspection" of a descending step by an average user with ordinary intelligence includes looking down at the step. Because plaintiff acknowledged that she would have seen the hose had she looked down at the step, the trial court did not err in finding that there was no genuine issue of material fact that the condition was open and obvious. Accordingly, we affirm the trial court's decision on that basis.

In light of our decision, it is unnecessary to consider whether defendants were entitled to summary disposition on other grounds.

Affirmed.

/s/ Pat M. Donofrio
/s/ Mark J. Cavanagh
/s/ Cynthia Diane Stephens